buildings, all the CLECs combined have extended their networks to serve an average of 10,000 buildings a year. What is so unreasonable about WinStar alone having a growth rate of 2500 buildings a year? Furthermore, WinStar fails to note is that its rate of growth has been increasing, so it may be able to serve all of those 50,000 buildings in much less than 20 years. To show this, we have prepared a chart (attached) showing that WinStar would actually have agreements in place to serve 50,000 buildings in less than three years, if the rate at which WinStar adds buildings continues to increase in the way it has since 1996.

Second, does WinStar really believe that the Commission can, by fiat, make anything happen merely because it might be good policy? Could WinStar really serve all those buildings if it had access to them now? What about the time and capital required to install facilities in those buildings? After all, that is the goal of facilities-based competition; while the network may "cover" them, that does not mean that WinStar could actually serve them. How does forced access help that problem in any way? Will WinStar next ask the Commission to order building owners to pay for its installation costs?

Third, does WinStar truly expect to have customers in every one of those 50,000 buildings, even if it could serve them? Does WinStar even want to have customers in every one of those buildings? There is evidence in our opening comments (again, both anecdotal and in the Charlton Survey) that building owners have asked various CLECs to come into their buildings and have been turned down. Won't one or more of WinStar's competitors get to at least some of those buildings first? If so, WinStar will presumably choose not to serve many of those buildings. WinStar itself notes that "[c]ompetitors will only request access where the economics of the building support providing service to the MTE."[43]

[43] WinStar Comments at 28.

The simple fact is that the real estate industry is not impeding the reasonable progress of WinStar or any other CLEC.

II. PUBLIC UTILITY STYLE REGULATION OF BUILDING ACCESS IS NOT JUSTIFIED.

The CLECs know that they only way they can win this argument is by creating the illusion that property owners and managers are monopolists. The law presumes that a business is free to charge any price it can obtain for its goods, including access to and the right to use its property, unless a government entity with proper jurisdiction and authority regulates those prices, or the business is engaged in activities that violate the antitrust laws. Therefore, the CLECs claim that property owners have "bottleneck control" and "extract monopoly rents," and access to pathways inside buildings is an essential facility. The CLECs support these claims with nothing more than rhetoric, and in any case the law does not allow the Commission to regulate building owners in that fashion.

Public policy has long recognized free and open competition as the principal and preferred means of regulating the nation's economy.[44] Departures in the form of economic regulation have occurred only when Congress has concluded that scale economies within a critical industry permitted the efficient operation of only one firm. Even then, competition has almost always continued to play an important role as a supplement to such regulation.[45] As for the telecommunications industry, in passing the Telecommunications Act of 1996, Congress clearly expressed the view that competition should replace regulation.

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[44] *See generally*, *Otter Tail Power Company v. United States*, 410 U.S. 372, 374 (1973); *United States v. Philadelphia National Bank*, 374 U.S. 321, 350-51 (1963); *California v. Federal Power Commission*, 369 U.S. 482, 489 (1962); *United States v. Radio Corporation of America*, 358 U.S. 334 (1959).

The CLECs have not shown why the Commission should depart from the free and open competition model in the distribution of telecommunications services to multiple-tenant users. Their claim of "bottleneck control" is meaningless. There is nothing unique in the need to reach some market segments by accessing privately controlled premises. Soft drinks and food stuffs, for example, are routinely marketed to or through privately owned restaurants, sports arenas and a wide variety of other privately held facilities without any requirement that the owners of those facilities open their facilities up to all competitors that wish access. Like any other risk taker, owners of such facilities are entitled to a reasonable return on their investments, and the ability to control access to their privately held facilities is simply one means of contributing to that return.

Rewarding facilities owners in this manner - be they restaurateurs or landlords -- is fully consistent with the consumer welfare objectives of the competition model. Without such rewards there would be no investments in private facilities. Rivalry among rental property owners, moreover, can be expected to limit these rewards to competitive levels while promoting a rational allocation of resources and increased consumer choice. Competition theory teaches that an open marketplace -- one in which sellers and buyers are free to make their own decisions with respect to how they will compete and what they will purchase -- will maximize consumer welfare. At the same time, interfering with that freedom needlessly, by means of forced access, will chill innovation and risk a loss of overall consumer choice.[46]

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[45] *See, e.g., Otter Tail Power Company, supra; Phonetele, Inc. v. American Telephone and Telegraph Company*, 664 F.2d 716 (9th Cir. 1981).

[46] *See, e.g.,* Kenneth L. Glazer & Abbott B. Lipsky, Jr., *Unilateral Refusals to Deal Under Section 2 of the Sherman Act*, 63 Antitrust L.J. 749, 756-59 (1995); Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841 (1990); William Blumenthal, *Three Vexing Issues Under the Essential Facilities Doctrine: ATM Networks as Illustration*, 58 Antitrust L.J. 855 (1990); David Reiffen & Andrew N. Keit, *Terminal Railroad Revisited: Foreclosure of an Essential Facility or Simply Horizontal Monopoly?*, 33 J.L. &

Effective competition is further assured by the sophistication of the market segment that is the focus of the CLECs and other carriers who seek a forced access rule. Understandably, that segment consists of revenue-rich commercial telecommunications users. Such users typically understand their communications needs and factor in those needs in their lease negotiations with building owners and managers. Industry data, moreover, confirms that alleged building access problems have not prevented CLECs and others from entering local telecommunications markets. In an analysis of eight large CLECs, for example, Strategic Policy Research, Inc. found that on average these carriers had gained access to over 229 buildings in each local market in which they operate a network.[47]

The best the CLECs can do is to claim that tenants are "locked-in" by their leases.[48] The fact that tenants enter into leases does not mean that they have no leverage over owners during

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Econ. 419 (1990); Note, *Rethinking the Monopolist's Duty to Deal: A Legal and Economic Critique of the Doctrine of "Essential Facilities,"* 74 Va. L. Rev. 1069 (1988).

[47] SPRI Study at 5, attached to Real Access Alliance Comments.

[48] *Eastman Kodak Co. v. Image Technical Services,* 504 U.S. 451 (1992), is of no relevance to the forced access debate. That case dealt with Kodak's efforts to prevent independent copying equipment providers from obtaining access to parts needed to repair Kodak's copiers. Kodak was able to force equipment users to obtain parts and service only from Kodak. Building owners, however, are not in Kodak's position because they do not provide telecommunications services to their tenants; they do not compete with telecommunications providers; and they do not charge tenants for access to telecommunications services. Kodak's relationship with individual customers centered on the provision of copiers and related parts and services to the customers by Kodak. The availability of telecommunications services, on the other hand, is only a part of a much larger and more complex relationship between building owners and tenants, and as the Commission has now recognized at least three times, that relationship gives building owners very different incentives from those that motivated Kodak. *See, Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996,* CC Docket No. 98-146, *Report,* 14 FCC Rcd 2398 (1999), ¶ 104; *Telecommunications Services Inside Wiring,* CS Docket No. 95-184, *Report and Order and Second Further Notice of Proposed Rulemaking,* 13 FCC Rcd 3659 (1997) at ¶ 178; *Policies Governing the Provision of Shared Telecommunications Services,* CC Docket No. 86-9, *Notice of Inquiry,* 102 FCC2d 1421, 1434 (1986) ("[E]ven if the STS operator is an exclusive provider

the lease term, however, nor does it mean that owners can ignore their telecommunications needs until the lease is up for renewal. The CLEC argument implicitly assumes that the real estate market is static, as if all leases in a building end at the same time. In fact, the real estate market is dynamic and fluid. There are many ways in which tenants can benefit from the dynamic nature of the market.

First, because buildings compete against each other for tenants, each building owner or manager must provide prospective tenants with the services they want. Once a prospective tenant demands access for a CLEC, existing tenants will ordinarily receive the benefit of the CLEC's presence. Second, owners have a strong incentive to meet existing tenant demand, no matter how long their leases may be, to avoid turn-over. It is far more profitable for an owner to renew or renegotiate a lease with an existing tenant than to incur all the costs associated with replacing an unhappy tenant upon expiration of its lease. Third, using an average office lease term of five years,[49] over 60% of leases in effect when the 1996 Act was passed have expired: tenants have had ample opportunity to get out of buildings that do not allow CLEC access. Fourth, at an average turn-over rate of 20%,[50] one in five office tenants will move, for one reason

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of telephone service in a building, the potential for abuse would seem to be limited if competition in the business real estate market provides potential tenants with the ability to choose among many available buildings."). Not only is the revenue from telecommunications purely ancillary – rather than primary, as copier revenues were for Kodak – but it is extremely small in relation to rental revenues, and it is not even paid by the tenant. As the Charlton Survey shows, 62% of owners and managers surveyed say that the primary reason they enter into access agreements is to satisfy tenants and to keep buildings marketable. Only nine percent listed additional revenue as the first reason. Finally, unlike in *Kodak*, property owners have no incentive to harm service providers, because they do not compete with them.

[49] For example, Charles E. Smith states that its leases are generally four to five years in length – which means that they are up for renegotiation in three to four years.

[50] This is a rule of thumb used by Charles E. Smith and other building owners.

or another, every year, thus creating further opportunities to get out of buildings that do not allow CLEC access.

For all these reasons, it is simply incorrect to argue that tenants are locked in or have no choices.[51] The rental market is not static, and property owners have to respond to tenant demands every day.

Nor can the CLECs show that building owners extract "monopoly rents." For one thing, they have not even attempted to prove that building owners are profiting from the presence of telecommunications providers. Second, for building owners to extract monopoly rents, they must first be monopolists, and they are no more monopolists than restaurant operators or convenience stores. Finally, even if we assume that every penny paid in access fees is pure profit, the amount is trivial in comparison to monthly rents. Real Access Alliance Comments at 8.

The most the CLECs have been able to say is that tenants are already paying for a share of common area space and therefore owners are being compensated for the use of that space. This misses the point entirely. First, many if not most owners do not charge load factors or loss factors; the general practice is to treat vertical riser space as a deduction from rentable area. In the residential market such separate charges for common area space are not used. Even where they are used, what the CLECs seem to be saying is that owners should pass the costs of access

[51] In their effort to cast building owners as villains, the CLECs make some truly bizarre arguments. For example, MCI claims that "building owners are effectively colluding" because hundreds of property owners have filed comments in this proceeding. MCI Comments at 6. The effect of the "collusion" is allegedly "strengthened by the relative lack of new building construction." *Id.*. The latter is a particularly odd statement, when one considers that annualized office construction starts as of June 30, 1999 were almost twice what they were at the end of 1996. Paine Webber Research Note (Aug. 16, 1996), Exhibit 2. Similarly, the value of new multi-unit construction put in place has been rising steadily since 1993, and at the end of 1998

through to tenants, because the presence of additional providers increases both the owner's risk and the direct costs of operating the building. Therefore, owners that charge load factors would have to increase those charges, and those who do not would have to institute them. This merely makes our fundamental point: telecommunications providers wish to transfer the cost of their presence in a building not to their subscribers in the form of rates, but to either the owner or to all the tenants in the building in the form of increased rental charges. This runs directly counter to the Commission's own policy of making the cost-causer pay.

Despite their utter inability to provide any factual basis for their claims, the CLECs insist that the Commission regulate the real estate industry on consumer protection or antitrust grounds. For example, on the theory that pathways inside buildings are an essential facility, Teligent would have the Commission regulate building access as if building owners were public utilities.[52] This approach fails not only for the practical reason that Teligent confuses access to one building with access to all buildings -- that is to say, as discussed above, building owners have neither the motive nor the opportunity to act against the interests of their tenants -- but for legal reasons as well.

First, according *MCI Comm'ns Corp. v. AT&T*, 708 F.2d 1081, 1132 (7th Cir. 1982), cited by Teligent, the essential facilities doctrine only applies if an essential facility is controlled by a monopolist. Even if in-building wiring were somehow deemed to be an essential facility, building owners are simply not monopolists. No court or agency has made the necessary

had reached its highest level since 1987. Bureau of the Census, Value of Construction Put in Place Statistics (1999), Table 22.

[52] Teligent Comments at 24.

finding; indeed, the Federal Trade Commission, as we noted in our opening comments, has found just the opposite to be true.[53]

Second, the purpose of the essential facilities doctrine is to prevent the extension of monopoly power from one market to another or from one stage of production to another.[54] Whatever control building owners have is limited to individual buildings – they cannot extend that control to other markets or stages of production.

And third, the Commission has no general authority to enforce the antitrust laws.[55] Furthermore, the Commission's specific antitrust authority under Sections 313 and 314 extends only to Commission licensees.

In sum, as we stated in our opening comments, the facts demonstrate that property owners do not have market power. They cannot extract monopoly rents because they are not monopolists. Whatever control they have over tenant choices is dissipated by the overall competitiveness of the real estate market, which gives tenants real alternatives.

III. THE CLEC COMMENTERS FAIL TO EXPLAIN HOW SECTION 224 AUTHORIZES ACCESS TO FACILITIES INSIDE BUILDINGS.

A. Utilities Generally Do Not Own or Control Ducts or Conduits Inside Buildings, and Rights-of-Way Do Not Extend Inside Buildings.

With the exception of the CLECs, the commenters generally agree that Section 224 does not apply to any facilities inside buildings.[56] Ducts and conduits inside buildings are generally

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[53] Real Access Alliance Comments at 6; see also SPRI Study at 3-10.

[54] *MCI Comm'ns Corp. v. AT&T*, 708 F.2d 1081, 1132 (7th Cir. 1982).

[55] "[T]he legislative history of the Act reveals that the Commission was not given the power to decide antitrust issues as such . . . ." *United States v. Radio Corp. of America,* 358 U.S. 334, 346 (1959).

[56] *See, e.g.,* Bell Atlantic Comments at 8; Cincinnati Bell Comments at 5-6.

not owned or controlled by utilities.[57] In addition, the access rights in buildings typically take the form of licenses or leases, rather than easements; therefore, they are not rights-of-way.[58] The CLECs may wish that Congress had written Section 224 to include facilities inside buildings.[59] Congress might even have the authority to amend the law in that fashion. But Congress has not done so.[60] So far, the Commission has always interpreted Section 224 correctly in this regard, and it must now avoid the temptation to exceed its authority.

1. Ducts and Conduits.

The CLEC commenters completely fail to consider basic principles of property law. They do not discuss the law of fixtures, or note anywhere the complexities associated with determining the ownership of facilities inside buildings. They do, however, implicitly concede that building owners will typically own ducts and conduits, because they emphasize the issue of "control."[61] Here, however, they simply gloss over the issue and assert, with no analysis, that utilities control ducts and conduit inside buildings. Again, this ignores both practical reality and the legal rights of property owners. Whatever rights a utility may have to place wires inside

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[57] *See, e.g.,* American Electric Power Service Corp. ("AEPSC") Comments at 10-11; Ameritech Comments at 4; Cincinnati Bell Comments at 5.

[58] *See, e.g.,* UTC Comments at 4; AEPSC Comments at 19.

[59] Teligent argues that the term "rights-of-way" includes both public and private rights-of-way; this may be true, but that does not mean that rights-of-way extend inside private property. For example, a utility might have an easement running up to a building, but have access to the building only under a license. The easement might be considered a right-of-way, but the license would not.

[60] As discussed in our opening comments at pp. 48 –53, Section 224 was never intended to apply to any facilities inside buildings. The legislative history of Section 224, and its regulatory history to date, not to mention its plain meaning, all show that Congress was concerned with access to transmission facilities, not to distribution facilities inside buildings. We are aware of no case under Section 224 or any other provision of law that supports the proposition that the term "right-of-way" includes the right to enter a building.

[61] *See* Teligent Comments at 35.

conduit or ducts are always limited by both the express provisions of any access agreement, and the building owner's overall control of the property. Utilities cannot be said to control ducts or conduit inside buildings because they cannot obtain access without the consent of the property owner. After-hours access, for example, may be impossible without the presence of the owner's representative. And the owner always has the right to exclude maintenance personnel of companies that have not entered into access agreements with the owner. Thus, ducts and conduits inside buildings are fundamentally different from those outside – the building owner and not the utility has final control over access.

2. Rights-of-Way.

There are no rights-of-way inside buildings for the simple reason that the kinds of rights used to grant building access are not considered rights-of-way. The CLECs again ignore reality and try to use the occasional exception to support broad, general statements.

For example, Teligent states that "[s]ome courts have defined [a right-of-way] as an easement while others describe a right-of-way as a license or contractual agreement."[62] The fact that "some courts" have ruled in a certain way proves absolutely nothing. It says nothing about what the general rule would be, and even if it did, it ignores the fact that the Commission cannot by fiat convert one form of access right into another. Therefore, the Commission cannot adopt a rule that will give the CLECs what they want in every case. In some number of cases – very likely a large number of cases, and in some states perhaps all cases – the Commission will likely find that property law and local practices will simply not lend themselves to the Commission's solution. The problem is the Commission cannot know with any certainty what the effects of its rule will be, at least not without a massive review of both property law and current ILEC and

[62] Teligent Comments at 27.

electric utility practices in every state. There is so much variety in state law, the terms of existing agreements, and conditions inside particular buildings that the Commission cannot adopt a coherent set of generally applicable rules.

We agree with Teligent that most courts that have examined the issue have tended to equate rights-of-way with easements. This is beside the point, however, for three reasons. First, the cases cited by Teligent do not stand for the proposition that the term "right-of-way" in Section 224 actually includes building access rights.[63] Second, the courts will not generally consider a license to be the same as a right-of-way, despite the occasional exception.[64] And third, even if a license inside a building were held to be a right-of-way, licenses are generally not apportionable, so as a matter of law the license holder cannot allow other users to share its rights.[65] Teligent's authority simply proves too little to serve as any kind of guide to making policy.

Similarly, the Section 621 cases cited by Teligent are irrelevant, because they say nothing about the scope of easements or property rights in general. It is simply not true that an easement

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[63] The Right-of-Way Act of 1875, for example, is irrelevant to this analysis. As Teligent itself notes, the legislative history of subsequent and related acts referred to rights-of-way as being interchangeable with easements. There is no such legislative history in the case of Section 224. In any event, Teligent misses the main point, which is that access rights inside buildings rarely take the form of easements.

[64] Teligent cites *Wilderness Society v. Morton,* 479 U.S. 842 (D.C. Cir. 1973), for the proposition that a license can be a right-of-way, but this case is entirely inapposite. First, the property in question was owned by the federal government and all the issues in the case arise under federal law. Second, the property was a true right-of-way, used to run a pipeline across Alaska; access to buildings was not an issue. And third, the "licenses" in question were actually "Special Land Use Permits," used to grant access to the main easement for construction and other purposes. The court found that these permits should be considered rights-of-way under the statute to prevent the Interior Department and the oil companies from effectively expanding the maximum width of the easement Congress intended to be granted to locate the pipeline.

[65] *See* Property Law Study attached to Real Access Alliance Comments at 16.

can, as a general rule, always be read to accommodate new uses and new users. This depends on the terms of the easement and of state law.

In short, because utilities neither own nor control ducts, conduits or rights-of-way inside buildings, the question of ownership or control under Section 224 is irrelevant, and the Commission cannot use Section 224 to establish forced access regulation.

B. The Commission Could Not Alter an Access Right Under Section 224 Without Altering the Property Rights of Building Owners and Utilities Under State Law.

Several CLECs argue that the Commission need not alter state property law to achieve their aims, because it would merely be defining the scope of "ownership or control" over rights of way for purposes of interpreting federal law.[66] This is nonsense. Ownership and control over property are intimately bound up with questions of both state contract law and especially state property law. Property is property and the extent of property in any given instance is created and defined only by state law.

What does it mean to say that the state can say to the property owner "You have the right to exclude anybody from the entirety of this half acre parcel" only to have the federal government say "You have the right to exclude anybody from this half acre parcel, except for the one-foot-wide strip occupied by the ILEC, which any CLEC can now use, but that does not affect your right to exclude for any other purpose"? How is this not an alteration of the right to exclude defined by state law? An easement, license or other right of access only extends to those persons and uses that have been agreed to by the property owner, as governed by state law. If state law provides that a certain type of grant conveys rights that were not expressly granted by the property owner, they are part of the rights held by the grantee. For the Commission to alter

[66] *See, e.g.,* WinStar Comments at 62; Teligent Comments at 28.

the terms of a grant, however, would alter the rights of both the grantee and the grantor in a manner that the federal government cannot do because it is not the source of the power that created the property rights in the first place. A duly authorized federal agency may take property rights created under state law upon payment of compensation; but it cannot create new property rights in areas that are within the jurisdiction of the states.

Furthermore, it is disingenuous to say that the Commission could interpret property rights only for purposes of federal law without altering state law rights: once third parties not covered by the original rights were granted access to property by the Commission, they might be held to have acquired additional rights merely by operation of state law. For example, what obligations does a landlord have to its lessees under state law? If a utility could be required to subdivide a rooftop site obtained under a lease to accommodate a CLEC, would the CLEC then have rights against the property owner under state landlord-tenant law? Would any implied covenants contained in a lease under state property law apply?

The Commission must recognize that it is subject to certain basic constraints under our system of government. They may be inconvenient at times, but they are what they are and the Commission is powerless to change them. One of these, however unfortunate for the CLECs, is the primacy of state law in defining property rights.[67]

[67] We also note that the CLECs ignore Section 601(c)(1) of the 1996 Act, which states that "[t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." This provision reinforces the point made in our opening comments that the Commission cannot modify or alter rights created under state property law. Section 601(c)(1) disposes of any argument that the amendments to Section 224 or the provisions of the 1996 Act generally authorize the Commission to alter its past interpretation of Section 224.

IV. NOTHING IN THE COMMUNICATIONS ACT GIVES THE COMMISSION JURISDICTION OVER BUILDING OWNERS.

The CLECs' reading of Section 2 of the Act and the related definitions at Section 3(33) and 3(51) is novel, creative, and wrong.[68] The concepts of "in personam" jurisdiction and "subject matter" jurisdiction have no place in communications law. The Commission does not have jurisdiction over wire as such, and it is incorrect to say that the Commission has jurisdiction over wire simply because it is an "instrumentality." The Commission has no more jurisdiction over building owners or over wire they own or control than it has over the contractors who install cable for the CLECs, or over the leasing of central office space to ILECs, or over the fabrication of fiber optic cable.

A detailed analysis of this issue is not really necessary. It was effectively disposed of by the Commission over 20 years ago when it concluded that it did not have the authority to regulate pole attachments. Telephone poles are just as much "instrumentalities" incidental to transmissions as wiring inside buildings, yet the Commission concluded that it would require an Act of Congress to give it the necessary authority. Congress not only agreed in 1978, but evidently concluded in the 1996 Act that the Commission needed specific authority to expand its pole attachment rules to include telecommunications carriers as well as cable companies. Furthermore, it is simply inconceivable that in adopting the 1996 Act and directing the wholesale restructuring of the telecommunications industry Congress could have intended to authorize the regulation of the real estate industry without even a whisper somewhere in the legislative history or the plain language of the law.

The concepts of in personam and subject matter jurisdiction do not appear in the Communications Act. Under Section 2(a), the Commission has jurisdiction over "all interstate and foreign communications by wire or radio . . . and to all persons engaged . . . in such communication . . . ." Thus, the Commission has jurisdiction over *communications* and *persons engaged in communications*. Those are the only things the Commission may regulate, and the reason that the CLECs are forced to introduce these foreign concepts is that they know that the Commission cannot reach building owners under the law.[69]

The grant of jurisdiction in Section 2(a) does not mean that the Commission can take any action it pleases within the scope of that jurisdiction. First, Section 2(b) limits that jurisdiction by excluding intrastate communications. Second, the remainder of the Act specifies what authority the Commission has to act within its jurisdiction. Title II, for example, authorizes the Commission to take certain acts – and withholds authority for other acts – related to common carriers. The remaining Titles of the Act do the same for different subject matters. Title I itself contains various general grants of authority; Section 4 ("Provisions Related to the Commission"), for example, authorizes the Commission to take a variety of actions related to its organization and staffing,[70] among other things. But jurisdiction does not necessarily confer authority, so merely because a person or subject might arguably be covered by Section 2(a) does not mean that the Commission can act with respect to that person or subject.

Nothing in the Act states that the Commission has jurisdiction over building owners or over their property. Building owners are not persons engaged in communications, so they are

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[68] *See, e.g.,* Teligent Comments at 48-50; WinStar Comments at 29-33.

[69] The Commission said as much in *Amendment of Part 68 of the Commission's Rules concerning Connection of Telephone Equipment, Systems and Protective Apparatus to the Telephone Network,* CC Docket No. 81-216, *First Report and Order,* 97 FCC 2d 527 (1986), at ¶ 14, where it stated that "[a]s an independent entity not subject to regulatory scrutiny, a building owner generally is not under a legal duty to respond to [tenant requests regarding telephone connections.]"

[70] *See, e.g.,* Section 4(b), 4(f).

outside the Commission's jurisdiction, unless they are engaged in the provision of services regulated under Title II or Title III.[71] The mere ownership or control of premises on which telecommunications facilities are located does not mean that building owners are engaged in communications. Otherwise, every utility, railroad, and government entity that owns or controls rights-of-way would be a person engaged in communications. In fact, even persons who actually are engaged in the provision of communications are not necessarily subject to Commission jurisdiction. *See Pennsylvania R.R. v. P.U.C. of Ohio,* 298 U.S. 170 (1936) (predecessor of Title II was "aimed at common carriers exclusively . . ., and not even all these."). Teligent misstates the facts and confuses the issue when it argues that in setting terms for access to buildings building owners charge for the use of telephone lines or prohibit the use of those lines.[72] Building owners charge for the use of their property. They are in the business of making real estate available to a variety of different types of tenants, and when a building owner requires a CLEC to enter into an agreement for access, it is charging for access to property, not for the use of telephone lines. Charging for the use of property is not even remotely the same thing as providing a communications service.

Similarly, the Commission does not have "subject matter" jurisdiction over wiring. It has jurisdiction over "communication by wire." In section 3(51), the Act defines communication by

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[71] This is an unremarkable proposition. In *Ambassador, Inc. v. U.S.,* 325 U.S. 317 (1945), the Supreme Court held that surcharges imposed by hotels for telephone services they provided to guests were subject to the Commission's Title II jurisdiction over tariffs. The hotels in that case were actually providing Title II services directly to their guests: hotel employees operated the switchboard, and the hotels were effectively reselling local service. *Id.* at 319 (hotel-employed operators handled calls), 324 (hotels were "retailing to patrons"). Few building owners actually provide any similar services to their tenants. Mere ownership of wiring, control over wiring, or control of access to premises does not fall into the same category as providing switching services.

[72] Teligent Comments at 50.

wire as the "*transmission* of writing, signs, signals, pictures and sounds of all kinds *by aid of* wire, cable, or other like connection . . . including all instrumentalities . . . incidental to such transmission" (emphasis added). Thus, the key term in the definition of "communication" is "transmission;" the word "instrumentalities" does not refer to something that may be regulated in addition to the transmission of signals. The clause beginning with "instrumentalities" is needed to clarify that the method of transmission, which is "by aid of" a wire or other physical connection between the points of origin and reception, may include equipment other than just the wire connection. But that does not mean that the wire itself is subject to the Commission's jurisdiction. It is the transmission that the Commission may regulate. The reference to "instrumentalities" is not intended to bring all the physical components of the connection directly under the Commission's jurisdiction, no matter who owns or uses them. Otherwise, once again, the Pole Attachment Act would never have been necessary.

Furthermore, even if the Commission had jurisdiction over wiring itself, it has no authority over wiring that is not stated elsewhere in the Act. The Commission's actions with respect to wiring have always been tied to the Commission's authority over common carriers, and no court has ever held that the Commission has plenary authority over wiring. For example, when the Commission deregulated customer premises equipment ("CPE"), the issue was whether CPE was a common carrier service. The Commission expressly stated "We do not reach the issue of whether CPE falls within our jurisdiction under Title I."[73] In deregulating inside wiring, the Commission relied on the same analysis.[74] Finally, as noted above, the Commission has

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[73] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry),* Docket No. 20828, *Memorandum Opinion and Order,* 84 FCC2d 50, 100 (1980) at ¶ 144.

[74] *Detariffing the Installation and Maintenance of Inside Wiring,* CC Docket No. 79-105, *Second Report and Order,* 59 R.R.2d (P&F) 1143 (1986) at ¶ 3, n.3.

acknowledged that building owners are not subject to the Commission's "regulatory scrutiny" in matters related to inside wiring.[75] In disclaiming authority over building owners in that context, the Commission implicitly disclaimed jurisdiction over wiring controlled by building owners.[76]

Another example is the Commission's lack of authority over data processing. In *GTE Service Corp. v. FCC,* 474 F.2d 724 (2d Cir. 1973), the court held that the Commission could regulate the offering of data processing services by common carriers because of the Commission's authority over the carriers, but also held that the Commission has no jurisdiction over data processing itself. Data processing involves the transmission of signals over wires, often using the same wires used to transmit communications; if the Commission had the authority to regulate all "instrumentalities" that might be engaged in the transmission of communications, then it would seem that the Commission could have used that authority to regulate the data processing industry. Furthermore, the Commission's ancillary jurisdiction did not extend to data processing. By analogy, therefore, the Commission cannot use any alleged authority over "instrumentalities" to regulate the real estate industry.

In addition, what would it mean for the Commission to have jurisdiction over wiring owned or controlled by building owners? Would the provisions of Section 214 apply to all

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[75] *Amendment of Part 68 of the Commission's Rules concerning Connection of Telephone Equipment, Systems and Protective Apparatus to the Telephone Network,* CC Docket No. 81-216, *First Report and Order,* 97 FCC 2d 527 (1986), at ¶ 14.

[76] The most that can be said is that Commission may be able to set technical specifications for facilities that are to be connected to the public network. *See NCUC v. FCC,* 537 F.2d 787 (4th Cir. 1976). WinStar misses the point when it states that the Part 68 rules limit a building owner's ability to determine the location of the demarcation point. The demarcation point has to do with what facilities are carried on a carrier's books, so it stands to reason that building owners have no authority over the demarcation point. The Commission's authority to set the demarcation point for that purpose does not give it the authority to regulate building owners or determine who owns what wiring. The Part 68 rules themselves impose no obligations on building owners or other persons beyond compliance with technical standards necessary for the protection of the public network.

building construction or renovation involving the installation or modification of telephone lines? Are building owners required to contribute to universal service? The CLECs' argument proves far too much. A reading of the statute broad enough to bring building owners within the reach of Title II and Title III cannot have been intended. No provision of the Act actually directs or authorizes the Commission to take any action with respect to building owners.[77] If the CLECs are correct, Congress limited and defined the Commission's authority in myriad ways with respect to the types of entities clearly intended to be regulated by the Commission, as in Titles II, III and VI, and yet Congress also gave the Commission a grant of jurisdiction broad enough to bring building owners and other entities within its reach, with absolutely no guidance or limits on what to do with that jurisdiction. This is a strange result and cannot be correct.[78]

In addition, even if mandating nondiscriminatory access to wiring is within the Commission's jurisdiction, mandating access to the property underlying it is not. There is no reading of Section 3(51) under which the real property to which wiring is attached can be considered an instrumentality, facility, apparatus or service. Therefore, the Commission could never direct building owners to admit any telecommunications provider that requested access.

In other words, wiring is only subject to the Commission's jurisdiction if it is owned or controlled by a person that the Commission is expressly authorized to regulate. And if a building owner is not engaged in the provision of communications, but merely owns or controls wiring

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[77] Note that Section 207 of the 1996 Act refers only to viewers and certain types of restrictions – it ever refers to building owners; and of course, Section 207 is not part of the Communications Act.

[78] Incidentally, if this is true, then it would seem that Section 221(b) actually removes wiring owned or controlled by building owners from Commission jurisdiction, at least in any case in which a state or local government has regulated.

that other parties use to transmit communications, then the building owner is not subject to the Commission's jurisdiction.

Finally, as we noted in our opening comments, the Commission has no ancillary jurisdiction where it has no jurisdiction under Section 2(a). Section 4(i) and Section 303(r) serve only to give the Commission authority in areas necessary to implement the express authority given by other sections of the Act. *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), is of no help to the CLECs, because it deals only with ancillary jurisdiction as it extends to carriers. The possibility of ancillary jurisdiction always exists as to persons subject to the Commission's jurisdiction under Section 2(a); it never exists as to persons outside that jurisdiction.

V. ANY FORCED ACCESS RULE IS A TAKING AND THE COMMISSION HAS NO AUTHORITY TO EXERCISE THE GOVERNMENT'S EMINENT DOMAIN POWER WITH RESPECT TO THE PRIVATE PROPERTY OF BUILDING OWNERS.

A. The CLEC Commenters Attempt To Ignore, Distort, And Amend The Leading Supreme Court Authority That Protects The Rights Of Building Owners Against The NPRM's Proposals That Would Constitute A Taking Of The Owners' Private Property

The 1986 Supreme Court decision in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), upheld the rights of a property owner to exclude a telecommunications carrier from the owner's premises based on the central principle that "the right to exclude" is one of the "most essential" of all property rights. [79] As fully explained in the Real Access Alliance's opening comments, this essential stick in the bundle of property rights unequivocally protects building owner from having to acquiesce to the uninvited presence of a telecommunications carrier on its property, absent receipt of constitutionally-adequate just compensation.

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[79] *Id.* at 433

Many of the CLEC commenters implicitly acknowledge that *Loretto* clearly would require that a number of proposals in the NPRM, notably the general non-discrimination rule, the extension of Section 224 to in-building facilities, and the extension of the OTARD Second Order,[80] be characterized as a taking of property within the meaning of the Fifth Amendment. It is for this reason that some of these commenters devote most of their effort to advising the Commission erroneously with respect to its authority to engage in the putative takings.[81] Alternatively, some of these CLEC commenters also try a variety of methods to distract the Commission from *Loretto* or otherwise to cloud or blur its plain significance.

One popular method is to assert that *Loretto*'s protections of a property owner's right to exclude others from his or her property is somehow diminished by the fact that the owner had previously invited a third party onto the property. This agreement runs directly counter to the holding in *Loretto*, which explicitly rejected the idea that an uninvited occupation could piggyback on an invited occupation. *Loretto*, 458 U.S. at 439, n. 17. Frequently cited for this proposition were *Yee v. City of Escondido,* 503 U.S. 519 (1992) and *FCC v. Florida Power Corp,* 480 U.S. 245 (1987). These cases, as fully explained in our initial submission, do not address a property owner's right to exclude uninvited parties from the property. Rather, both of these cases address complaints by property owners who are unhappy with a regulation of the <u>rents</u> or <u>rates</u> that they can charge their commercial tenants—arguing, unsurprisingly, that they have a right to charge more for the space they lease. While rent and rate controls can, under

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[80] *Implementation of Section 207 of the Telecommunications Act of 1996 – Restrictions on Over the Air Reception Devices: Television Broadcast, Multichannel Multipoint Distribution and Direct Broadcast Satellite Services,* CS Docket No. 96-83, Second Report and Order, 13 FCC Rcd 23874 (1998) ("OTARD Second Order).

[81] *See* Attachment to ALTS Comments at 48-54; Winstar Comments at 55-50; and Teligent Comments at 60-65.

limited circumstances, be successfully challenged under the Constitution, this is a completely different constitutional challenge, as a factual matter as well as a matter of well established constitutional law, than the assertion by a property owner of a constitutional right to exclude others from the property. The challenges in *Yee* and *Florida Power* are very difficult to prove and depend upon a balancing test for their resolution; by contrast, the *Loretto* test could not be more clear cut: a government authorized, permanent physical occupation of an owner's property constitutes a *per se* taking under the Constitution.

The Commission should not be distracted by the attempts of the plaintiffs in *Yee* and *Florida Power*—echoed by the CLEC commenters in their comments—to equate economic regulations of the landlord-tenant relationship with government authorized occupations of property by an uninvited party. The Supreme Court rejected this attempt in *Yee* and *Florida Power*, and the Commission should likewise reject it now. The NPRM requested comment on proposals that would authorize third parties to occupy facilities on the property of MTE building owners despite the absence of any invitation from the building owner. These proposals fall squarely within the definition of a *per se* taking under *Loretto*, no matter how hard CLEC commenters try to redefine them as mere regulations of the landlord-tenant relationship.

One indication of the weakness of the efforts by the CLEC commenters to avoid the plain meaning of *Loretto* is the occasional but blatant attempt simply to distort its holding. In at least one submission, a commenter repeatedly described the holding in *Loretto* as deciding that "an initial physical invasion" constitutes a taking under the Constitution requiring just compensation.[82] The *Loretto* decision does not in any way limit itself to "initial" invasions, nor does it emphasize, focus on, or even mention that the physical occupation in that case is "initial."

[82] *See, e.g.*, Teligent Comments at 54, 56, 66.

Indeed, the Supreme Court comes closest to touching on this concept in rejecting a defense to the takings claim, when it dismisses the argument that the landlord could avoid the government authorized invasion by not inviting any tenants into the building: this argument, the Court held, proves far too much, as it would condition use of the building on abandoning the essential right to exclude other, uninvited parties.[83] In other words, the Court actually acknowledged that the landlord in *Loretto* had already invited certain parties to occupy its property, so that the authorized occupation by the cable company was not in fact the "initial" occupation, meaning that the Court's decision was premised on exactly the <u>opposite</u> fact the CLEC commenters claim was part of the holding. The insertion of the word "initial" into the description of the *Loretto* decision is therefore a gross and misleading distortion of the case that is most central to the Commission's assessment of the constitutional issues raised by the NPRM.

Other examples of the weakness of the arguments proffered by the CLECs include the assertion that there is no Takings Clause problem because building owners are being compensated by their existing tenants, and the advice that the Commission should not defer to state property law. These points are equally groundless attempts to ignore the actual nature of the Fifth Amendment's protection of private property rights.

First, there is simply no basis, either in reason or in law, for the argument that some or all of the revenues a property owner is <u>already</u> receiving according to <u>previously</u> negotiated rates, and that is totally unaffected by the regulation at issue, can somehow constitute "just compensation" for a taking effectuated by that regulation.[84] The constitutional requirement of "just compensation" for a taking of property refers to the payment of an award that compensates

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[83] *Loretto*, at 438-39, n. 17.

[84] MCI Comments at 15-16.

the property owner for the property that was taken, and not to prior economic benefits unrelated to the taking. Moreover, the receipt of pre-existing rental income by building owners bears no relation whatsoever to the so-called "reciprocal benefit theory," which describes a situation where a new law arguably takes property from a citizen, but also uses that taking to confer direct benefits onto that citizen of sufficient value to compensate for the appropriation. *See, e.g.*, Responses of Stewart Management Corp. and National Multi-Housing Council, et al. *Colorado Springs Prod. Credit Ass'n v Farm Credit Admin.*, 967 F.2d 648, 654 (D.C. Cir. 1992) ("A long line of Supreme Court decisions emphasizes that the government may compel a private party to surrender its funds without providing just compensation if *the government's use of those funds confers a significant, concrete, and disproportionate benefit on that party.*") (emphasis added). Clearly, the continued receipt of rental income from tenants whom the NPRM in no way requires or directs to continue renting from building owners, to pay these owners increased levels of rent, or to confer any other benefit onto these owners, cannot possibly be viewed as "just compensation" for the NPRM's proposed taking of the owners' private property.

Second, the Commission should disregard the proffered advice that it need not defer to state law. This advice is a perverse reversal of the fundamental operative principles of the Takings Clause. As explained in our initial submission, the Takings Clause protects property rights as they are understood to exist under relevant state and local property law, and not as judged to be appropriate in light of federally-mandated public policy goals. This basic precept of Takings Clause jurisprudence has been reiterated in several Supreme Court cases discussed at length in our prior submission, and also has been the subject of recent exposition by Judge Loren Smith, the Chief Judge of the Court of Federal Claims, the venue in which takings cases are generally heard. The following passage responds to a government argument against the private